92-1476

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

E.M. SCHULZE, JR.,

Petitioner

versus

SOUTH MAIN BANK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a judgment in a civil case directing petitioner to "work" for a governmental agency violates the Thirteenth Amendment's prohibition against involuntary servitude?

2. Whether it was a denial of due process to order petitioner to "work" for a governmental agency under a rule of civil procedure authorizing "such orders . . . as are just"?

3. Whether it was a denial of due process to order petitioner punished without his being notified in advance that he was subject to punishment and without affording him an opportunity to be heard?

LIST OF PARTIES

The parties to the proceedings below and in this Court are petitioner, E.M. Schulze, Jr. and respondent, South Main Bank.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, entered in the above entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas is reported at 837 S.W.2d 733 (Tex. App.-Houston [14th] 1992). (Appendix, 21.)

JURISDICTION

Petitioner seeks review of a judgment entered on August 13, 1992, by the Court of Appeals for the Fourteenth Supreme Judicial District of Texas. (Appendix, 63.) The judgment was subject to discretionary review by the Texas Supreme Court, but it, on December 16, 1992, denied petitioner's application for writ of error. On December 31, 1992, petitioner filed a motion for rehearing, and it was denied on January 20, 1993. (Appendix, 65.)

This Court has jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Thirteenth Amendment to the United States Constitution:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 215(2)(b) of the Texas Rules of Civil Procedure:

> If a party or an officer, director, or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination,

such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expense unjust. Such an order shall be subject to review on appeal from the final judgment. (Emphasis added.)

Section 215(3) of the Texas Rules of Civil Procedure:

If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after

> notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

STATEMENT OF THE CASE

Petitioner is an attorney. In November of 1989, petitioner, in his capacity as counsel for Don T. Braden, was served with a motion to compel answers to discovery requests and for sanctions. (Appendix, 73.) The motion did not: (a) mention petitioner by name (other than in the certificate of service); (b) refer to petitioner in his representative capacity; (c) allege an "abuse of the discovery process;" (d) request sanctions against petitioner as an individual; (e) refer to Rule 215(2)(b) or Rule 215(3) of the Texas Rules of Civil Procedure; (f) refer to an "inherent power" of the court to sanction attorneys; or (g) request that petitioner be ordered to

perform work for a governmental agency or be sanctioned in any other manner. The motion only requested the court to compel discovery responses, to order petitioner's client to pay $500.00 in attorney's fees, and to dismiss the action if the responses to the discovery requests were not timely served.

The district judge heard the motion and then, sua sponte, went beyond the requests of South Main Bank. The court found that petitioner's client had stated "frivolous" objections to pretrial discovery requests. As punishment, the judge entered an interlocutory order directing petitioner to report to the Child Protective Services Agency of Harris County, Texas, and perform "work." The judge's order also imposed a $10,000.00 fine against petitioner's client. The interlocutory order directed the fine to be paid and the work to be performed prior to entry of final judgment. Petitioner had no opportunity to voice

objections to his being punished because he had not been informed that he might be punished.

The Texas Supreme Court, in a subsequent mandamus proceeding, without expressing any opinion whether the punishment was authorized, directed the district judge to modify his order to at least defer payment of the fine and performance of the work until petitioner and his client had exhausted their appellate rights. Braden v. Downey, 811 S.W.2d 922, 931 (Tex. 1991).

The district judge, in accordance with the Texas Supreme Court's direction, entered a final judgment, ordering the same punishments, but deferring performance until petitioner's appellate rights were exhausted. (Appendix, 66.) Prior to entry of the judgment, petitioner orally presented his constitutional objections to his being punished as an individual. And, he formally

presented his constitutional objections in a motion for new trial. The objections were carried forward in the appeal to the Court of Appeals and overruled. (Appendix 35, 46, and 57.)

The judgment of the trial court reflects that the punishment was imposed pursuant to Section 215(2)(b) of the Texas Rules of Civil Procedure and "the inherent power of the Court to regulate the attorneys which practice before it . . . ." The judgment does not state the type of work to be performed by petitioner; it only describes it as "community service work." Apparently, the officials of the governmental agency have been delegated the authority to direct petitioner to do any type of manual labor they desire so long as it is related to the functions of their agency.

Petitioner and his client appealed to an intermediate appellate court which reversed the imposition of the fine against petitioner's client, but affirmed the judg-

ment directing petitioner to perform work for a governmental agency. Braden v. South Main Bank, 837 S.W.2d 733 (Tex.App.-Houston [14th] 1992, writ denied). The Texas Supreme Court declined to review the judgment of the intermediate court.

Unless this Court grants this petition and reverses the judgment, petitioner will be coerced, under threat of being held in contempt of court, to perform some type of "work" for a governmental agency.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE WORK ORDER WAS NOT PROHIBITED BY THE THIRTEENTH AMENDMENT.

Petitioner's position consists of a simple syllogism:

a. involuntary servitude is prohibited except as punishment for a crime;

b. petitioner has not been

convicted of a crime, nor has he disobeyed a court order, nor has he volunteered to perform work; therefore,

c. the order commanding him to perform work is prohibited.

This Court should grant the petition for a writ of certiorari because the Thirteenth Amendment was conceived "as a charter of universal civil freedom for all persons." Bailey v. Alabama, 219 U.S. 219, 241 (1911). Consequently, the right to be protected from work orders is a fundamental right which should be ardently protected. To condone an encroachment upon that right, however slight, is to raise the specter of work orders becoming an accepted remedy for breach of civil duty. The Thirteenth Amendment does not condone work orders in moderation - it states that involuntary servitude shall not "exist."

While the Thirteenth Amendment has been held inapplicable in certain situations,

none of the exceptions are analogous to this case. For example, in Robertson v. Baldwin, 165 U.S. 275, 282 (1897), this Court held that contracts of seamen, involving a surrender of personal liberty, may be enforced without regard to the Amendment. This is not analogous because petitioner has not contracted to render any services to the Child Protective Services Agency of Harris County. Nor, is this case analogous to those situations in which a government coerces the performance of services such as road work or military service. See Butler v. Perry, 240 U.S. 328 (1916); and, Arver v. United States, 245 U.S. 366 (1918). In these situations there is a statutory duty to perform a particular service, and a threat of criminal punishment is used to coerce performance of that specific service. That is not the case here. Petitioner has no statutory duty to perform services for the Child Protective Services

Agency of Harris County. In this case, work in behalf of a governmental agency is being ordered as the punishment itself. Conceptually, this case is akin to a situation in which a court orders a person to do work for a highway department or serve in the military as punishment for breach of a civil duty - only the governmental agency is different.

To uphold the judgment in this case would be to treat the unambiguous language of the constitutional prohibition as if it were a mere admonishment, subject to being disregarded whenever a judge deems it expedient to do so. Orders compelling citizens to perform work for breach of civil obligations are powerful weapons in the hands of those who would exercise autocratic power. For example, they might be utilized to compel a person who defaulted in payment of a debt to work for a creditor, or they might be used to force a migrant farm worker

who had breached an employment contract to toil for an employer. Work orders as remedies for breach of civil obligation are unknown to our jurisprudence, and this Court should exercise its jurisdiction to insure that work orders do not become an accepted remedy for breach of civil obligations.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TEXAS RULE AUTHORIZING "SUCH ORDERS . . . AS ARE JUST" IS NOT UNCONSTITUTIONALLY VAGUE.

The work order was made by the trial court under the "inherent power" concept and the authority of Texas Rule 215-2(b), authorizing a court to make such orders as are "just." The Texas Court of Appeals upheld the order under Rule 215-2(b). Petitioner asserts that the imposition of a work order under either standard violates his right to due process. Vague standards

deny due process because they permit arbitrariness and they fail to provide fair warning. Grayned v. City of Rockford, 408 U.S. 104 (1972).

It is improbable that this Court will ever be presented with standards which are more vague than the ones which have been utilized in this case. Using "justice" as an expression of the range of permissible punishment is the equivalent of authorizing the imposition of whatever punishment a judge deems fit. Utilizing "inherent power" to invent punishments amounts to the same thing. The standards contain no expression of the factors to be taken into consideration; they contain no expression of the types of punishment which are authorized; they contain no expression of the types of punishment which are prohibited; and, they contain no expression of the magnitude of punishment which is permissible. The concepts purport to confer the power to

punish unfettered by any rational standard.

Such standards are repugnant to the fundamental premise that the citizens of the United States are to be governed by rules of law, rather than the rules of particular individuals. A judge with the power to mete out such punishment as the judge deems fit has the apparent power to create unusual forms of punishment, to establish and apply personal normative standards, and to impose punishments which cannot be anticipated. In short, the imposition of innovative forms of punishment under such broad concepts is tantamount to a standardless exercise of judicial power. Just as all citizens are entitled to be informed as to what the state commands or forbids, they are also entitled to be informed as to what types of punishment are permissible.

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER RECEIVED ADEQUATE ADVANCE NOTICE.

The motion served on petitioner amounted to no notice. Petitioner was not advised that he was personally subject to being punished, and he was not afforded an opportunity to be heard until after the trial court had announced its order. Sanctions cannot be imposed without affording the offending party fair notice and an opportunity to be heard. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

The order in this case was entered in the context of imposing sanctions for breach of the rules governing the discovery responsibilities of attorneys. The nature of the punishment imposed and the procedure utilized exemplify a tendency toward arbitrary power and a disregard for due

process requirements in discovery sanction cases. This Court should grant the petition for a writ of certiorari to delineate the requirements of due process in the context of imposing sanctions against attorneys for breach of discovery responsibilities.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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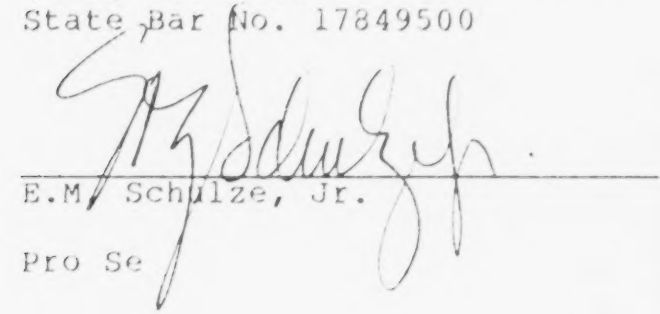

E.M. Schulze, Jr.

Pro Se

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Affirmed as Modified and Opinion filed
August 13, 1992.

In The

Fourteenth Court of Appeals

No. B14-91-01277-CV

DON T. BRADEN AND E.M. SCHULZE, JR., Appellants

V.

SOUTH MAIN BANK, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 89-04947

OPINION

The parties entered into an agreed interlocutory judgment as to the merits of this lawsuit on July 24, 1990. It was

incorporated into a final judgment signed by the trial court on July 25, 1991, pursuant to South Main Bank's (the Bank) Motion for Entry of Final Judgment. The judgment settled all disputes between the parties except for the trial court's imposition of discovery sanctions, which are the subject of this appeal. The judgment of the trial court is affirmed as modified.

In 1988, Don T. Braden filed suit against the Bank and others in Montgomery County. The Bank took Braden's deposition on September 20, 1988. At the deposition, Braden was evasive and conferred with his attorney over sixty times. Braden v. Downey, 811 S.W.2d 922, 927 (Tex. 1991). In February of 1989, the Bank filed a motion to transfer venue to Harris County. This motion was granted. Because of the lack of information gained through the deposition process, the Bank sought additional facts through written discovery. In fact,

Braden's attorney, E.M. Schulze, Jr., "suggested" during Braden's deposition that the Bank should seek its information through interrogatories. In June of 1989, the Bank served Braden with its first set of interrogatories, requests for production of documents, and requests for admissions. Braden timely responded on July 18, 1989. The case was subsequently consolidated with a suit pending in Harris County which the Bank had previously commenced against other persons involved in the transactions out of which the litigation between Braden and the Bank arose. On November 16, 1989, after the consolidation, the Bank filed a motion to compel answers to interrogatories and requests for production and for sanctions. The Bank asserted that the responses, couched as objections, were frivolous and harassing. The motion sought $500 in attorney's fees under TEX. R. CIV. P. 215(d), a dismissal of Braden's suit if he

failed to comply within 20 days, and for any other relief to which the Bank might be entitled. On December 18, 1989, more than thirty days after this motion was filed and served, a hearing was held before the Honorable Daniel M. Downey, the presiding judge of the 295th Judicial District Court. As the docket was called, Judge Downey warned the lawyers on both sides that he believed discovery abuses were occurring, and that if he had to rule on the interrogatories in question someone would be sanctioned. [1] The trial court did not give any indication as to which party or attorney was in danger of being sanctioned. The warnings prompted both attorneys to leave the courtroom in an attempt to settle the discovery disputes. The attorneys

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1 The warnings were off the record; however, they were placed on the record at a later hearing as best as the parties and the court could remember.

returned to the courtroom without having reached an agreement. At that time, the trial court considered the Bank's motion to compel and for sanctions. The court went through the interrogatories to which Braden had objected. The objections made by Braden to many of the interrogatories in question were substantially as follows:

> This interrogatory is objected to because it is vague, ambiguous, overly broad, nonspecific, and unduly burdensome in requesting this party to "state all facts relied upon" in denying the claim. Under the Texas Rules of Civil Procedure the number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. An interrogatory requesting a party to "state all facts" in essence requests a party to state the entire substance of all testimony, documents, and other evidence which may be offered at trial. This would of necessity involve a narrative discourse encompassing more than thirty answers and would require the disclosure of work product.

Braden would also respond that he had been

questioned extensively about the matter in his deposition and to require him to respond again would be unduly burdensome. To other interrogatories Braden objected on grounds of relevancy or contended that the interrogatories required more than thirty answers, the limit set by TEX. R. CIV. P. 168. Out of the many interrogatories posed, Braden responded to approximately ten. The remaining interrogatories were objected to on one or more of the grounds stated above. The trial court agreed with Braden that the interrogatories violated Rule 168 because more than thirty answers were required. To remedy this, the trial court ruled on the interrogatories until it reached the thirty answer limit. The Rule 168 objection was the only objection sustained by the trial court. The trial court criticized Braden's other objections and overruled them. After hearing arguments from both sides, the trial court found that both parties were abusing

the discovery process in seeking and resisting discovery. On January 3, 1990, the trial court issued an order in which it found that Braden's answers to the interrogatories were unreasonably frivolous, oppressive and harassing. The trial court then ordered Braden to pay $10,000, as a sanction, to the Bank within 30 days and ordered Braden to answer the interrogatories and produce the requested documents. The court also ordered Braden's attorney to perform ten hours of community service at Child Protective Services of Harris County as a sanction. The attorney for South Main Bank was ordered to perform five hours of community service at Child Protective Services, apparently for violating Rule 168 and for combining all of the discovery requests in a single document. The court ordered that the community service be performed by both attorneys before February 15, 1990.

The Bank's attorney performed the community service ordered by the court and Braden timely complied with the trial court's order compelling answers to interrogatories and production of documents. However, appellants Braden and Schulze filed a Motion for Leave to File Petition for Writ of Mandamus in the Court of Appeals challenging the $10,000 sanction and the community service imposed on Schulze, but leave was denied. Appellants then filed a similar motion in the Texas Supreme Court. It granted appellants leave to file and conditionally granted a writ of mandamus "to direct Judge Downey to modify his order to defer payment of monetary sanctions and performance of community service until final judgment is rendered to allow Braden an opportunity to appeal." Braden, 811 S.W.2d at 930. The Supreme Court did not make a specific determination regarding the propriety of the sanctions. The trial court

conformed its final judgment to reflect the decision of the Supreme Court. On July 25, 1991, the trial court signed the final judgment from which Braden and Schulze appeal.

In their first point of error, appellants allege that the trial court erred in imposing sanctions against them because the objections to the discovery requests of the Bank were made prior to the time when the Harris County trial court acquired jurisdiction.

Rule 215(2)(b) states that if a party fails to comply with a discovery request, the "court in which the action is pending" is authorized to enter orders concerning the matter. TEX. R. CIV. P. 215(2)(b). Further, Rule 215(3) states that the authority to impose sanctions for abuse of the discovery process is conferred upon "the court in which the action is pending." TEX. R. CIV. P. 215(3). Appellants contend that since

the original discovery requests were propounded and objected to prior to the consolidation, Judge Downey was without jurisdiction to sanction them for any abuse of the discovery process. Appellants argue that the phrase "the court in which the action is pending" refers to the court in which the action is pending at the time the alleged abusive conduct occurs. We disagree with this interpretation.

Changes of venue, consolidations, and transfers of cases are everyday occurrences. These often occur when the parties are well into the discovery process. If we accept the argument made by appellants, the parties would be required to return to the original trial court for a determination as to the discovery abuse and for appropriate sanctions. Or, as appellants suggest, we should restrict the power of the trial court that finally acquires jurisdiction and allow it to consider only that alleged abuse which

takes place after it acquires jurisdiction. Neither of these approaches is practical. We refuse to accept appellants' hypertechnical construction and hold that the phrase "the court in which the action is pending" means just that. Appellants' first point of error is overruled.

In point of error number two, appellants allege the trial court erred in imposing sanctions against them because it is not an abuse of the discovery process to state objections to discovery requests.

Appellants cite the Texas Disciplinary Rules of Professional Conduct and the Texas Lawyer's Creed in support of their argument and claim that if the objections had not been made, Schulze would not have been "zealously" representing Braden as required. However, the Disciplinary Rules do not authorize an attorney to make frivolous and harassing objections to discovery requests. In fact, this conduct is specif-

ically mentioned in Rule 215. TEX. R. CIV. P. 215(3). The rule states, in pertinent part:

> If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may . . . impose any appropriate sanction. . .

TEX. R. CIV. P. 215(3)(emphasis supplied). Appellants' argument suggests that because the rule does not mention objections, any response or answer is not subject to sanctions if it is couched in terms of an objection. If this were the law, litigants could delay and obstruct the discovery process perpetually through objections, no matter how absurd those objections might be, without fear of penalties. This is not the law in Texas. We hold that the reference in

Rule 215(3) to answers or responses includes responses in the form of objections and as such, are subject to sanctions as are any other responses. Appellants' second point of error is overruled.

In their third point of error, appellants allege the trial court erred in imposing sanctions against them because the objections to the discovery requests were not frivolous and as a result, there was no factual basis for the trial court to find an abuse of the discovery process. Our review of the record bears out the trial court's finding that most of the objections made by appellants were frivolous and harassing. One glaring fact is that appellants made the same exact objection to almost all of the interrogatories posed by the Bank. That objection was set out in full earlier in this opinion. In Braden v. Downey, the mandamus action involving this very contention, the Supreme Court stated that

because Braden was "less than forthcoming" in his deposition, he foreclosed any subsequent objection to interrogatories on the ground that the Bank requested information provided in the deposition. Braden, 811 S.W.2d at 927. The court also held that the Bank's interrogatories were not so vague that it was an abuse of discretion for the trial court to order that they be answered. Id. at 927-28. Besides, the trial court sustained Braden's objections that the interrogatories exceeded the thirty answer limit set by Rule 168, and the Supreme Court held this rule establishes a boundary for the type of "contention interrogatories" posed by the Bank. Id. Therefore, Braden was sufficiently protected from any vague interrogatories. Lastly, Braden never asserted or presented any evidence on any applicable privilege. The Supreme Court concluded that Braden failed to demonstrate that the trial court abused

its discretion in ordering him to answer the Bank's discovery requests. The record supports this holding and the further holding that there was a sufficient factual basis for the trial court to conclude that appellants' objections were harassing and subject to sanctions. Appellants' third point of error is overruled.

In point of error four, appellants argue that the trial court erred in imposing sanctions against them because they were not provided with timely, advance notice that the trial court would consider the discovery abuse issue. Appellants allege this lack of notice denied them procedural due process. Appellants claim that they did not know that the trial court was going to "review their conduct under the abuse of discovery concept." They also argue that they were unaware that any monetary fine or community service might be imposed. Appellants claim that the only notice they had that their

conduct was going to be reviewed by the court and that they might be sanctioned for such conduct was an off the record, ambiguous warning by the trial court. The arguments propounded by appellants are tenuous at best when the record is reviewed.

On November 16, 1989, the Bank filed and served on the appellants, their Motion to Compel Answers to Interrogatories, Production of Documents, and for Sanctions. In this motion, the Bank claimed that Braden's responses to interrogatories were evasive and incomplete and therefore constituted a failure to answer. In its prayer, the Bank asked the trial court to compel Braden to answer certain interrogatories and requests for production; asked that a default judgment be entered in their favor if Braden failed to respond to the discovery requests within 20 days; and requested $500 in attorney's fees and any other relief to which it might be entitled.

A cursory review of the caption of the motion, the motion itself, and the prayer for relief were sufficient to put the appellants on notice that conduct during discovery was going to be reviewed by the trial court, and that the Bank was seeking sanctions. See Woodruff v. Cook, 721 S.W.2d 865, 870 (Tex.App.-Dallas 1986, writ ref'd n.r.e). Also, the transcript of the hearing held on December 18, 1989, reveals that the purpose of the hearing was to hear the Bank's motion to compel. At no time during the course of the hearing did Schulze object and argue that neither he nor his client had received adequate notice.

Imposing sanctions on a party without notice and an opportunity to be heard would violate the requirements of due process. See Worldwide Anesthesia Assoc., Inc. v. Bryan Anesthesia, Inc., 765 S.W.2d 445, 448 (Tex.App.-Houston [14th Dist.] 1988, no writ). Here, appellants were well aware of

the nature of the motion filed by the Bank and were aware that the purpose of the hearing was to make a determination as to that motion. Appellants were given notice of the hearing more than thirty days before it was held and were afforded all the due process they were entitled to. Appellants' argument is without merit, and point of error four is overruled.

In their sixth point of error, appellants contend the trial court erred in imposing sanctions against them because the type of sanctions that were imposed are not proper until the court has previously attempted to secure compliance with the discovery rules by less punitive means.

In TransAmerica Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991), the Supreme Court held that a sanction imposed for discovery abuse should be no more severe than necessary to satisfy its purposes. 811 S.W.2d at 917. Thus, the court reasoned,

trial courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance. Id. In Braden, The Supreme Court held that sanctions should not be so severe that a party's willingness or ability to continue the litigation will be significantly impaired. See Braden, 811 S.W.2d at 929. Appellants argue that based on the holdings in TransAmerica and Braden, the trial court abused it discretion by failing to consider the imposition of lesser sanctions.

In TransAmerica, the trial court struck TransAmerica's pleadings in their entirety and rendered a default judgment in favor of Toma on its counterclaim. Id at 916. The basis for this sanction was the failure of TransAmerica's president to appear for deposition. In effect, the trial court ordered the "death penalty" sanction for a single discovery abuse. The Supreme Court

held that the trial court had abused its discretion and that the sanction imposed was unjust under Rule 215. Id. at 919.

Appellants also cite Koepp v. Utica Mut. Ins. Co., 35 TEX. SUP. CT. J. 161 (November 23, 1991), in support of their argument. In Koepp, the trial court entered a take nothing judgment as a sanction for filing unverified and unsigned interrogatories one day late. Id. at 161. As in TransAmerica, the Supreme Court held that the trial court abused its discretion. Id. The court stated that sanctions which preclude the presentation of the merits of the case should not be assessed absent flagrant bad faith or callous abuse of the discovery process. Id at 162. Both of these cases are distinguishable from the case before us.

In TransAmerica and Koepp, the Supreme Court was addressing situations where the trial court had imposed the "death penalty"

sanction for a single discovery abuse. Here, no pleadings were struck and no default judgment was entered. Appellants were not prevented from presenting the merits of their case. When the Supreme Court in TransAmerica cautioned trial courts to consider the availability of less severe sanctions, we do not believe the court was referring to the type of sanctions imposed here. Rather than imposing the "death penalty" sanction, the trial court imposed a monetary sanction and community service. Thus, a sanction "less severe" than the "death penalty" was imposed.

In regard to appellants' argument under Braden, we believe that appellants have quoted the language from the case out of context. Appellants state that the Supreme Court characterized the sanctions in this case as being so severe as to raise "the real possibility that a party's willingness or ability to continue the litigation will

be significantly impaired. Braden, 811 S.W.2d at 929. However, in the sentence prior to the one quoted by the appellant, the Supreme Court qualifies its statement by stating that a sanction of the magnitude as the one in this case raises the possibility that the ability to continue the litigation will be impaired if it must be paid before any opportunity for supersedeas and appeal. Id.(emphasis supplied). Thus, the concern over the sanction in this case arose not over the amount of the sanction, but concerned whether a sanction of this amount must be paid prior to the opportunity for supersedeas and appeal. The Supreme Court cured this error in the mandamus action by requiring the trial court to delay the imposition of the sanctions until appellants were granted an opportunity for direct appeal. Id at 930-31. Since the sanction order was stayed, it could not have had a chilling effect on appellants' ability or

willingness to continue the litigation.

We believe the Supreme Court's reference in TransAmerica to less severe sanctions to be a caution to trial courts to consider less severe sanctions before imposing sanctions such as dismissal, entry of default judgment or the imposition of a monetary fine so great as to chill a litigant's ability to maintain his suit. Appellants' sixth point of error is overruled.

In their ninth point of error, appellants allege that the trial court erred in imposing a monetary fine and community service as sanctions for discovery abuse because those sanctions are not specifically authorized by TEX. R. CIV. P. 215.

Rule 215(3) states that a trial court may impose any appropriate sanction authorized by Rule 215(2)(b)(1), (2), (3), (4), (5), and (8). TEX. R. CIV. P. 215(3). None of these sections refers to monetary

fines or community service as possible sanctions, nor does Rule 215(3) contain the broad encompassing language "such orders as are just" as does Rule 215(2)(b). Because of this, The First District Court of Appeals held that when a party is sanctioned under Rule 215(3), the trial court is limited to the sanctions specifically listed in Rule 215(2)(b). Owens-Corning Fiberglas v. Caldwell, 807 S.W.2d 413, 415 (Tex. App.-Houston [1st Dist.] 1991, no writ). However, in TransAmerica, the Supreme Court rejected the holding of the First Court of Appeals and held that paragraphs 2(b) and 3 leave the choice of sanctions to the sound discretion of the trial court. TransAmerica, 811 S.W.2d at 917. The court went on to state that by referring to paragraph 2(b), paragraph 3 incorporates the language in paragraph 2(b) and the trial court may make any orders that are just. Id. The court held that the only pertinent inquiry is

whether the imposed sanctions under paragraph 2(b) or paragraph 3, are just. Id. Further, the Supreme Court, citing Braden v. Downey, specifically rejected the decision in Owens-Corning and held that the trial court does have authority to assess monetary fines as sanctions under Rule 215(3). TransAmerica, 811 S.W.2d at 921, n. 3 (Gonzalez, J., concurring); see Braden, 811 S.W.2d at 928-29. But see Clone Component Distribs. v. State, 819 S.W.2d 593, 597 (Tex.App.-Dallas 1991, no writ) (no citation to TransAmerica or Braden).

Appellants are correct in their assertion that monetary fines and community service are not specifically mentioned as possible sanctions in Rule 215. See TEX. R. CIV. P. 215(2)(b). However, in light of the language in TransAmerica and Braden, a trial court is not limited to the laundry list of specifically authorized sanctions even when the sanctions are assessed under Rule

215(3). TransAmerica, 811 S.W.2d at 921, n.3; see Braden, 811 S.W.2d 928-29;. Rule 215(2)(b) specifies eight sanctions, TEX. R. CIV. P. 215(2)(b)(1) through (8), as well as, in its introductory paragraph, "such orders in regard to the failure as are just." TEX. R. CIV. P. 215(2)(b). As long as the trial court's order is just and comports with the requirements of TransAmerica, the fact that the specific sanction assessed is not contained in Rule 215(2)(b) is not a ground for reversal whether sanction is assessed under Rule 215(2)(b) or 215(3). Appellants' ninth point of error is overruled.

In point of error ten, appellants argue the trial court erred in imposing monetary sanctions and community service sanctions because paragraph (2)(b) of Rule 215 authorizing "such orders . . . as are just" is vague. Appellants contend that under the circumstances of this case, the imposition

of these sanctions under this standard is a denial of due process. We disagree.

Paragraph 2(b) has been reviewed in many contexts by the intermediate appellate courts of this state and the Texas Supreme Court. We have been unable to find any case where the courts were confronted with the specific question of whether paragraph 2(b) is vague. However, within the numerous holdings, we can find no hint that any Texas court considers "such orders . . . as are just" ambiguous. This standard has long been accepted by the courts of this state as sufficient for reviewing the impositions of discovery sanctions. See, e.g., TransAmerica, 811 at 917. This standard is no more vague than other legal concepts such as "abuse of discretion." Even if it could be argued that the words, "such orders . . . as are just," are vague in and of themselves, the Texas Supreme Court has cured any potential problem with the test set out in

TransAmerica. In TransAmerica the court held:

> In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanctions imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanctions should be visited upon the offender. Second, just sanctions must not be excessive. The punishment should fit the crime. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance.

Id. The court went on to state that the above standards would set the bounds of permissible sanctions under Rule 215 within which the trial court is to exercise sound discretion. Id. With such guiding principles propounded by the Texas Supreme

Court, it is impossible to say that paragraph 2(b) is unconstitutionally vague. Appellents' tenth point of error is overruled.

In their eleventh point of error, appellants contend the trial court erred in imposing sanctions against them because the sanctions were not just or appropriate in this case.

A trial court may impose sanctions on any party that abuses the discovery process. Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986); TEX. R. CIV. P. 215. The discovery sanctions imposed by a trial court are within that court's discretion and will be set aside only if the court clearly abused its discretion. Bodnow, 721 S.W.2d at 840. Abuse of discretion occurs when the trial court fails to act with reference to any guiding rules and principles. Downer, 701 S.W.2d at 241-42. Another way of stating the test is whether

the act was arbitrary or unreasonable. Id. A trial court abuses its discretion in imposing discovery sanctions if the sanctions imposed are not just. TransAmerica, 811 S.W.2d at 917; see TEX. R. CIV. P. 215(2)(b). Whether sanctions are just is measured by two standards: (1) a direct relationship must exist between the offensive conduct and the sanction imposed; and (2) just sanctions must not be excessive. TransAmerica, 811 S.W.2d at 917. With these standards in mind, we will review the sanctions imposed on Braden and Schulze. Because the trial court assessed two types of sanctions, we will review the sanctions separately.

MONETARY SANCTIONS

The trial court ordered that Braden pay the Bank the sum of $10,000 as a sanction for abuse in resisting discovery under Rule 215(3). We note that no specific prayer for

$10,000 was made by the Bank in its Motion to Compel and for Sanctions. The Bank prayed for $500.00 in attorney's fees and any other relief to which it might be entitled. The only statements made and the only evidence presented before the trial court entered its sanction order on January 3, 1991, came from the Bank's attorney. He testified that if the case was required to go to the court of appeals, his expenses would be $5,000. No other evidence was presented at this hearing as to monetary sanctions. Thus, there is nothing in the record showing any connection between the $10,000 awarded and any harm suffered by the Bank as a result of the alleged discovery abuse. See Hanley v. Hanley, 813 S.W.2d 511, 521 (Tex. App.-Dallas 1991, no writ). The record does not reflect that $10,000 was anything more than an arbitrary amount. It was not requested by the Bank, nor did the Bank put on any evidence to support the

amount of $10,000. We hold that when a trial court assesses a monetary sanction, there must be some evidence in the record linking the amount awarded to harm actually suffered by the party seeking sanctions. The sanction imposed is not just because there is no direct relationship between the offensive conduct and the sanction imposed. See TransAmerica, 811 S.W.2d at 917. At the hearing held on July 9, 1991, the Bank's attorney did attempt to present evidence linking the $10,000 sanction to harm suffered by the Bank; however this evidence was presented approximately six months after the trial court had already awarded the $10,000 to the Bank. This was an attempt by the Bank's attorney to comply with the standards set forth in TransAmerica. In fact, the Bank's attorney stated on the record:

> Well, your Honor, in reading the Supreme Court opinion (sic) in

> Braden vs. Downey and in TransAmerica vs. Powell, I guess in order to made the record correct, assuming Mr. Schulze wants to take an appeal, I probably need to put on evidence as to some of the requirements or guidelines set forth in TransAmerica vs. Powell.

This "after the fact" evidence cannot be used to support the $10,000 sanction. The evidence was not before the trial court when the award was made and the record reflects that the trial court did not even consider this evidence. Therefore, we hold that the monetary sanction imposed against Braden is unjust and the trial court acted without reference to the applicable guiding rules. In light of our decision reversing the imposition of the monetary sanction, it is unnecessary to discuss appellants' points of error five and seven because they also challenge the monetary sanction imposed by the trial court.

The imposition of the monetary sanction was reversed by this court because there was no evidence presented by the Bank showing that the $10,000 was related to specific harm suffered by the Bank. In the case of the community service sanction, we do not believe that such evidence was required. As to this saction, all we must determine is whether the sanction imposed was just. First we must determine whether the sanction imposed is related to offensive conduct in question. It is clear from the record that the sanctions in this case were imposed because Mr. Schulze responded to the Bank's interrogatories with harassing and frivolous objections. The record further shows, and the Supreme Court recognized, that Mr. Schulze's conduct through the discovery process was less than professional. See Braden, 811 S.W.2d at 927. As stated by the

Supreme Court, a just sanction must be directed against the abuse and visited upon the offender. TransAmerica, 811 S.W.2d at 917. We hold that there is a relationship between the offensive conduct and the sanction imposed. Secondly, we must determine whether the sanction imposed was excessive. Mr. Schulze was ordered by the trial court to perform ten hours of community service at Harris County Child Protective Services. We believe this sanction is sufficient to satisfy the legitimate purposes of discovery sanctions. The purposes of discovery sanctions are to: (1) secure the parties' compliance with the rules of discovery, Ebeling v. Gawlik, 487 S.W.2d 187, 190 (Tex.Civ.App.-Houston [1st Dist.] 1972, no writ); (2) deter other litigants from violating the discovery rules, Downer, 701 S.W.2d at 242; Garcia Distrib. v. Fedders Air, 773 S.W.2d 802, 807 (Tex.App.-San Antonio 1989, writ denied);

and (3) punish parties that violate the rules of discovery, Jarrett v. Warhola, 695 S.W.2d 8, 9-10 (Tex.Civ. App.-Houston [14th Dist.] 1985, writ ref'd). Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986); Stoll v. Rothchild, 763 S.W.2d 437, 440 (Tex.App.-Houston [14th Dist.] 1988, writ denied). We were unable to find any Texas cases addressing this type of discovery sanction; however, we believe such a sanction can be just. In fact, this specific sanction was implicitly approved by the Texas Supreme Court in Braden when the court stated that it did not "criticize this type of creative sanction." Braden, 811 S.W.2d at 930. The community service sanction ordered by the trial court meets the standards set forth in TransAmerica. Therefore, the trial court did not abuse its discretion and its order as to the community service is affirmed.

Beyond their argument that the

community service sanction was unjust, appellants contend in their eighth point of error that the trial court erred in imposing this sanction because it violates the provision of the U.S. Constitution prohibiting involuntary servitude except as punishment for a crime, See U.S. CONST. amend. XIII, Sec. 1.

We have been unable to discover any cases, state or federal, which deal with this specific issue; however, we have found cases involving situations analogous to the one presented here. We first turn to cases involving assessment of sanctions under Federal Rule of Civil Procedure 11. The rule states, in pertinent part:

> . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction.

FED. R. CIV. P. 11. This rule, much like

TEX. R. CIV. P. 215(2)(b) and (3), provides for sanctions in the event of abuses. Rule 11 also gives a court discretion in the type of sanction to be imposed. There is little difference between an "appropriate sanction" and a "just" sanction. Like sanction cases under Rule 215, Rule 11 sanction cases are reviewed using an abuse of discretion standard and district courts are admonished, as are Texas trial courts, to tailor the remedy to fit the abusive conduct. See Jennings v. Joshua Ind. Sch. Dist., 948 F.2d 194, 196-97 (5th Cir. 1991) cert. denied, ___ U.S. _____, 112 S.Ct. 2303 (1992). In determining whether certain sanctions are appropriate for Rule 11 violations, courts have held that non-monetary sanctions are acceptable, and in fact encouraged, if such sanctions promote Rule 11's purposes of education, compensation, and deterrence. See Id.; Thomas v. Capital Sec. Serv. Inc., 836 F.2d 866, 877-78 (5th

Cir. 1988)(enbanc). In Thomas, the Fifth Circuit specifically mentioned the use of public or private reprimands as appropriate non-monetary sanctions, and the court stated that judges have broad discretion in choosing the appropriate penalty for Rule 11 violations. Thomas, 836 F.2d at 876-78. The court held that the considerable discretion vested in the trial court is authorized because of the use of the word "appropriate" in Rule 11. Id. at 876. We agree with the reasoning of the Thomas court, and hold that non-monetary sanctions are acceptable and authorized under the broad terms of TEX. R. CIV. P. 215. But, our inquiry cannot end here. Appellants do not complain that non-monetary sanctions are unacceptable, rather they contend the community service violates the involuntary servitude provision of the U.S. Constitution. Now that we have determined that non-monetary sanctions can be used for

Rule 215 violations, we turn to appellants' specific argument.

The cases most closely analogous to the argument raised by appellants are income tax cases in which the Internal Revenue Service (IRS) has attached a taxpayer's wages to satisfy past due taxes. In such cases, taxpayers have alleged that attaching wages constitutes involuntary servitude under the 13th Amendment, i.e. requiring the taxpayer to work on behalf of a governmental entity. Courts have expressly rejected this argument holding that any action taken or ordered by the IRS or a court stems from the conduct of the taxpayer and not from the party who ordered the attachment. See Detwiler v. United States, 406 F.Supp. 695 (E.D. Penn. 1975), aff'd, 544 F.2d 512 (3d Cir. 1976), cert. denied, 429 U.S. 1105 (1977); Beltran v. Cohen, 303 F.Supp. 889 (N.D. Cal. 1969). Therefore, the courts held that the concept of involuntary servitude was not invoked and

such action by the IRS did not violate U.S. CONST. amend. XIII, Sec. 1. Id. These cases are comparable to the instant situation. It is not the action of the court which has created the situation. Rather, Mr. Schulze's own conduct brought about the community service sanction. When one's own conduct results in discovery violations which causes a community service sanction to be assessed, the 13th Amendment is inapplicable. We hold that community service sanctions do not violate the 13th Amendment and are available as sanctions under Rule 215. Appellants' eighth point of error is overruled.

The judgment of the trial court is

affirmed as modified.

/s/ Paul C. Murphy
Justice

Judgment rendered and Opinion filed August 13, 1992.

Panel consists of Justices Murphy, Robertson and Cannon.

Publish - TEX R. APP. P. 90.

August 13, 1992.

JUDGMENT

The Fourteenth Court of Appeals

DON T. BRADEN AND E.M. SCHULZE, JR., APPELLANTS

No. B14-91-01277-CV

V.

SOUTH MAIN BANK, APPELLEE

This cause, an appeal from the agreed judgment in favor of South Main Bank, appellee, signed July 25, 1991, came on to be heard on the transcript of the record. We have inspected the record and find the trial court erred in ordering Don T. Braden, appellant, to pay $10,000 to South Main Bank, appellee, as sanctions for abusing the discovery process because there is no evidence in the record to connect the monetary sanction to any harm suffered by South Main Bank as a result of the alleged

discovery abuse. We therefore REFORM the judgment of the court below and order the trial court to delete that portion of the judgment ordering Don T. Braden, appellant, to pay $10,000 to South Main Bank, appellee, as sanctions for abusing the discovery process.

We order the remainder of the judgment AFFIRMED except as heretofore modified.

We order Don T. Braden and E.M. Schulze, Jr., appellants, jointly and severally, to pay all costs incurred because of this appeal.

We order this decision certified below for observance.

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 20, 1993

Mr. E.M. Schulze, Jr.
Davis, Durham & Schulze
P.O. Box 671
Huntsville, TX 77342-0671

Mr. Randall A. Pulman
Stumpf & Falgout
1400 Post Oak Blvd.
Suite 400
Houston, TX 77056

RE: Case No. D-2975

Style: E.M. SCHULZE, JR.
V. SOUTH MAIN BANK

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

/s/ Michael C. Murphey
Deputy Clerk

No. 89-04947

SOUTH MAIN BANK	X	IN THE DISTRICT
	X	
V.	X	
	X	
FM 149 BUSINESS PARK, LTD., LOUIS R. BRADEN, WILLIAM C. BRADEN, JR., MICHAEL HAJOVSKY, KENNETH BEVERLY, B&H JOINT VENTURE, DON W. BOYETT, ANTHONY D. CARIDI, and MARION R. CLARK	X	COURT OF HARRIS COUNTY, TEXAS 295TH JUDICIAL DISTRICT

CONSOLIDATED WITH
No. 89-09726

DON T. BRADEN	X	IN THE DISTRICT
	X	
V.	X	COURT OF
	X	
SOUTH MAIN BANK, LOUIS R. BRADEN, W.C. BRADEN, JR., ANTHONY CARIDI, BEVERLY HAJOVSKY & CO., a Texas partnership, FRED W. CARLEY, and CARL STOCKHOLM	X	HARRIS COUNTY, TEXAS 190TH JUDICIAL DISTRICT

FINAL JUDGMENT

ON the 9th day of July, 1991, came on to be heard the motion for entry of final judgment of Plaintiff, South Main Bank. The

Court, having reviewed said motion, the response thereto filed by Don T. Braden and the testimony presented, is of the opinion that said motion is meritorious and should be granted. It is, therefore,

ORDERED that pursuant to Justice Nathan L. Hecht's opinion delivered June 19, 1991 in Case No. C-9438, Don T. Braden, Relator, v. Honorable Daniel M. Downey, Judge of the 295th District Court of Harris County, Texas, Respondent, the Court hereby modifies its order of January 3, 1990 in the following respects:

The Court finds that Don T. Braden has abused the discovery process in seeking or resisting discovery. The Court further finds that with respect to Don T. Braden, that Don T. Braden has filed or made answers to discovery which are unreasonably frivolous, oppressive, and constitute harassment pursuant to Tex.R.Civ.P. 215(3). This finding is based upon Don T. Braden's

conduct during his deposition of September 20, 1988, and Don T. Braden's failure to answer the interrogatories and document requests described in this Court's order of January 3, 1990. The court finds that Braden's abuse of the discovery process caused South Main Bank to incur reasonable and necessary attorneys' fees of $2,687.50. It is, therefore,

ORDERED, ADJUDGED AND DECREED that South Main Bank have judgment of, from, and against Don T. Braden in the amount of $2,687.50 as a discovery sanction pursuant to Tex.R.Civ.P. 215 Sec. 2b(8). It is further,

ORDERED, ADJUDGED AND DECREED that, pursuant to Tex.R.Civ.P. 215 Sec. 2b and the inherent power of the Court to regulate the litigants which appear before it, Don T. Braden pay additional sanctions to South Main Bank for such abuse in the amount of $7,312.50. It is further,

ORDERED, ADJUDGED AND DECREED pursuant to Tex.R.Civ.P. 215 Sec. 2b and the inherent power of the Court to regulate the attorneys which practice before it, that the attorney for Mr. Braden, Mr. E.M. Schulze, Jr., is hereby ordered to report to the Child Protective Services Agency of Harris County, Texas, where he will produce and perform ten (10) hours of community service work between now and thirty (30) days from entry of this order, unless an appeal is taken by Don T. Braden or Mr. E.M. Schulze, Jr. In such event, Mr. Braden is to perform his community service work within thirty (30) days from the expiration of all rights of appeal. Mr. Schulze is to produce evidence of compliance with this Court's order within forty (40) days from the entry of the order, or forty (40) days from the expiration of all rights of appeal. It is further,

ORDERED, ADJUDGED AND DECREED that South Main Bank ("SMB") have judgment of,

from and against Don T Braden in the amount of $140,000.00 together with interest at the rate of 10% per annum from the date hereof until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against B&H Joint Venture in the amount of $77,500.00 together with interest at the rate of 10% per annum from the date hereof until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against Michael Hajovsky in the amount of $25,833.33 together with interest from the date hereof at 11% per annum until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against Kenneth Beverly in the amount of $25,833.33 together with interest from the date hereof at 11% per annum until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against William

C. Braden, Jr. in the amount of $38,500.00 together with interest from the date hereof at 11% per annum until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against Louis R. Braden in the amount of $38,500.00 together with interest from the date hereof at 11% per annum until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against Marion Clark in the amount of $40,000.00 with interest at a rate of 8% per annum until paid; it is further

ORDERED, ADJUDGED AND DECREED that this Court's prior order of August 3, 1989 granting SMB summary judgment against FM 149 Business Park, Ltd., a Texas limited partnership, and William Braden, Jr., is hereby adopted and that SMB have judgment against FM 149 Business Park, Ltd., a Texas limited partnership, in the amount of $293,751.60 together with interest in the

amount of 11% per annum from the date hereof until paid; it is further,

ORDERED, ADJUDGED AND DECREED that a take-nothing judgment is hereby entered against Don T. Braden on all his claims against SMB; it is further

All relief not specifically granted herein is hereby denied. South Main Bank is entitled to all writs necessary to enforce this judgment.

DONE this 9th day of July, 1991.

/s/ Daniel M. Downey,
Judge Daniel M. Downey,
Presiding

APPROVED:

STUMPF & FALGOUT

/s/ Randall A. Pulman
Randall A. Pulman
State Bar No. 16393250
1400 Post Oak Boulevard, Suite 400
Houston, TX 77056
(713) 871-0919
(713) 871-0408 (Telefax)

ATTORNEYS FOR SOUTH MAIN BANK

No. 89-04947

SOUTH MAIN BANK	X	IN THE DISTRICT
	X	
V.	X	
	X	
FM 149 BUSINESS PARK, LTD., LOUIS R. BRADEN, WILLIAM C. BRADEN, JR., MICHAEL HAJOVSKY, KENNETH BEVERLY, B&H JOINT VENTURE, DON W. BOYETT, ANTHONY D. CARIDI, and MARION R. CLARK	X	COURT OF HARRIS COUNTY, TEXAS 295TH JUDICIAL DISTRICT

CONSOLIDATED WITH
No. 89-09726

DON T. BRADEN	X	IN THE DISTRICT
	X	
V.	X	COURT OF
	X	
SOUTH MAIN BANK, LOUIS R. BRADEN, W.C. BRADEN, JR., ANTHONY CARIDI, BEVERLY HAJOVSKY & CO., a Texas partnership, FRED W. CARLEY, and CARL STOCKHOLM	X	HARRIS COUNTY, TEXAS 190TH JUDICIAL DISTRICT

PLAINTIFF SOUTH MAIN BANK'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES, PRODUCTION OF DOCUMENTS, AND FOR SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff SOUTH MAIN BANK

("SMB" herein) and moves this Court as follows:

1. On June 15, 1989, SMB served Don T. Braden ("Braden" herein), with SMB's First Set of Interrogatories, Request for Production of Documents, and Requests for Admission of Facts to Don T. Braden ("SMB's Request for Discovery"), pursuant to Tex. R. Civ. P. 167, 168, and 169. A true and correct copy of the SMB's Request for Discovery is attached as Exhibit "A".

2. On July 18, 1989, Braden served his Response to Request for Production, Admissions and Interrogatories pursuant to SMB's Request for Discovery, a true and correct copy of which is attached hereto as Exhibit "B". SMB propounded twenty-five interrogatories. Braden responded with five repetitive and elusive objections to seventeen of the twenty five interrogatories.

3. All of Braden's responses are evasive and incomplete answers which should

be treated as a failure to answer. See Tex. R. Civ. P. 215(1)(c). SMB groups the interrogatories and Requests for Production together with Braden's objections and answers.

I.

Interrogatory No. 2: Please identify every person having knowledge of any matter relevant to or reasonably calculated to lead to the discovery of admissible evidence in the pending action.

Braden's response: To the knowledge of this party, the only persons having knowledge of relevant matters are the parties to this lawsuit, the parties to Cause No. 89-04947, the persons mentioned in my deposition taken on September 20, 1988, and respective attorneys of the parties. The addresses and business affiliations of these persons are already known to you. To require this party to compile a list of addresses is unduly burdensome.

4. Braden's answer is insufficient. Braden must name the persons which have relevant knowledge. Tex. R. Civ. P. 166b(2)(d) ("a party may obtain discovery of the identity and location . . . of any

potential party and of persons having knowledge of relevant facts"); Farm Serv. v. Gonzales, 756 S.W.2d 747 (Tex.App.-Corpus Christi 1988, writ denied) (respondent to interrogatories must disclose identity of all persons having knowledge of any fact concerning incident). Braden has clearly failed to meet the request.

II.

Interrogatory Nos. 3, 4, 5, 7, 9, 13(c), 13(d), 13(e), 14(c), 14(d), 14(e), 15, 17, 18, 20, 22 and 23. All of these interrogatories inquire into the substance of Braden's counterclaim against SMB and his defenses to SOUTH MAIN BANK's claims.

Braden's response: These interrogatories are vague, ambiguous, overly broad, non-specific, and unduly burdensome in requesting this party to state all facts relied upon, state in detail, or state with specificity. The number of questions including subsections in this set of interrogatories is not limited to thirty answers.

5. The respondent to an interrogatory may be requested to "specify in detail each and every" fact which is the basis of his

claim. Teer v. Duddleston, 641 S.W.2d 569, 578 (Tex. App.-Houston [14th Dist.] 1982) rev'd on other grounds, 664 S.W.2d 702 (Tex. 1984). Courts have been quite willing to allow requests for specific information. See Garcia v. Allen, 751 S.W.2d 236, 237 (Tex.App.-San Antonio 1988, writ denied); see also Alexander v. Barlowe, 671 S.W.2d 531, 533 (Tex.App.-Houston [1st Dist.] 1983, writ ref'd.). The shotgun approach used by Braden is apparent when reviewing Interrogatory No. 13 which goes to the heart of Braden's claim.

6. Besides being legally insufficient, Braden has failed to show the Court how the discovery is unduly burdensome, costly or harrassing to produce. Independent Insulating Glass v. Street, 722 S.W.2d 798, 802 (Tex.App.-Ft. Worth 1987, writ dism'd.). A trial court without this information cannot make an informed decision to limit discovery or on where to place the

cost for complying with the discovery. Id. Braden's objection does not give any reason for the burdensome nature of the request.

III.

Interrogatory Nos. 3, 4, 5, 9, 10, 13(c), 13(d), 13(e), 14(c), 14(d), 14(e), 15, 17, 18, 20, 21 and 22. All of these interrogatories inquire into the substance of BRADEN's counterclaim against SOUTH MAIN BANK and his defenses to SOUTH MAIN BANK's claims.

Braden's response: These interrogatories have been answered because Don T. Braden has been extensively examined at deposition about these very same matters. To now inquire about these same matters in interrogatories is unduly burdensome.

7. Braden's objection that the interrogatories exceed thirty answers is not supported by any case law. In cases which address the subject matter, the discovering party clearly propounded interrogatories which exceeded thirty request. SMB has propounded twenty five interrogatories as found in SMB's Request for Discovery.

8. This objection is also legally

insufficient. The prior deposition testimony of a party does not preclude specific interrogatories. Second, Braden has not stated with specificity the burdensome nature of the interrogatories. Third, Braden's deposition was taken on September 20, 1988. Since that time, Braden has added a DTPA claim against SMB, and SMB has counterclaimed against Braden on his guaranty. Therefore, this objection is without merit.

IV.

Interrogatory No. 12 and Request for Production No. 2. These discovery requests inquire into some of Don T. Braden's other business dealings which would undermine his position as an unsophisticated investor.

Braden's response: This interrogatory and request for production does not concern a matter which is relevant to the subject matter in the pending action and it is not reasonably calculated to lead to the discovery of admissible evidence. This suit does not concern any property at Walden on Lake Conroe, and Dalton International is not a party.

9. A party may seek discovery which

is reasonably calculated to lead to admissible discovery. Tex. R. Civ. P. 166b(2)(a). Braden claims several causes against SMB because he is an unsophisticated investor. Information concerning Bradens' investment history is relevant to these claims and may lead to discoverable information. Moreover, Don Braden waived these objections by failing to make them at his deposition. See Exhibit "C" at p. 35-36.

V.

Request for Production No. 5. Produce any and all documents which may lead to the discovery of admissible evidence in this case or which are relevant to any claim made by a party in this lawsuit.

Braden's response: This request does not "set forth the items to be inspected either by individual item or by category, and does not describe each item and category with reasonable particularity" as is required by Rule 167, Texas Rules of Civil Procedure.

10. To date there has not been any opinion published or decision made which rules on this request for production

objectionable. There is not a material difference between this request and a request for the identity of all witnesses as allowed by rule 168 and as permitted by the courts. Braden should not be permitted to introduce documents into trial which have not been produced prior to trial.

11. SMB would show that attorneys' fees of $500 should be awarded to counsel for SMB for the preparation and filing of this motion.

WHEREFORE, PREMISES CONSIDERED, SMB as plaintiff prays that this Court enter an Order as follows:

1. That Braden is compelled to answer interrogatory Nos. 2, 3, 4, 5, 7, 9, 10, 12, 13(c), 13(d), 13(e), 14(c), 14(d), 14(e), 15, 17, 18, 20, 21, 22, and 23 and Request for Production Nos. 2 and 5 pursuant to Rule 215(b);

2. That Braden is ordered to pay to SMB's counsel the sum of $500 as attorneys' fees for the preparation and filing of this Motion as required pursuant to Rule 215(d).

3. That Braden's Second Amended Original Petition are stricken and that the action is dismissed with prejudice and that a default judgment be taken against Braden if the answers to SMB's Request for Discovery are not served within 20 days from the signing of the appended Order.

And for all other relief, both general and special, at law and in equity, to which the

Defendant may show itself entitled.

Respectfully submitted,

STUMPF & FALGOUT

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ATTORNEYS FOR SOUTHMAIN BANK

CERTIFICATE OF SERVICE

This is to certify that on the 16th day of November, 1989, a true and correct copy of the above and foregoing document was forwarded by certified mail, return receipt requested to:

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/s/ Randall A. Pulman
Randall A. Pulman

SMB/FM149/COMPEL.MOT

(EXHIBITS OMITTED)

Supreme Court, U.S.
FILED
APR 22 1993

No. 92-1476

In The

Supreme Court of the United States

October Term, 1992

E.M. SCHULZE, JR.,

Petitioner,

vs.

SOUTH MAIN BANK,

Respondent.

On Petition for Writ of Certiorari to the Texas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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NAMES OF ALL PARTIES

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409/295-5751

Respondent

South Main Bank

Represented by:

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PRELIMINARY STATEMENT

Petitioner E. M. Schulze, Jr., brings this action as the last of five appeals to challenge the authority of a Texas trial court to impose sanctions against attorneys for conduct abusive of the discovery process. Petitioner was the attorney for Don Braden, a defendant to a collection suit. In addition to a sanction levied against Braden for $10,000, Petitioner was personally sanctioned for his conduct. The trial court found that the Petitioner's answers to discovery were "unreasonably frivolous, oppressive, and constitute harassment pursuant to Texas Rules of Civil Procedure 215(3)." (Tr. at 35) Petitioner argues that the trial court's ruling was improper, issued without sufficient notice and exceeded the court's authority. Respondent contends that the trial court's action was completely within its authority, and complies with the most recent Texas Supreme Court decisions on sanctions.

BACKGROUND

I. APPELLATE HISTORY

The litigation between the parties commenced in 1988 when Braden filed a strike suit against South Main Bank and others in Montgomery County, Texas. Venue of this suit was transferred in February of 1989 to Harris County, Texas, upon Respondent's motion.

Respondent took the deposition of Braden on September 20, 1988. At this deposition, Braden was very evasive, repeatedly conferred with his counsel, Schulze, (a point which the Texas Supreme Court noted with interest) and generally failed to cooperate. After the deposition was taken, Braden significantly amended his pleadings. Because of the evasive answers at the deposition, and the newly amended pleadings, Respondent sought additional facts by way of written discovery. In June of 1989, Respondent served on Braden its "Defendant's First Set of Interrogatories, Request for Production of Documents,

and Request for Admission of Facts to Plaintiff Don T. Braden." (Tr. at 45) On July 18, 1989, Braden timely served his objections and responses on Respondent. Respondent contended then, and contends to this day, that those objections and responses were frivolous and harassing. Respondent filed its "Plaintiff, South Main Bank's Motion to Compel Answers to Interrogatories, Production of Documents, and for Sanctions (hereinafter referred to as "the Sanctions Motion")." This motion clearly sought sanctions by way of its title, its body, and both specific and general prayers for relief.

After notice and more than thirty days from the filing of the Sanctions Motion, an oral hearing was held before the Honorable Daniel M. Downey, presiding in the 295th Judicial District Court of Harris County, Texas. As the docket was called, Judge Downey gave stern warnings to the lawyers for both Braden and Respondent. Judge Downey warned the lawyers that

he believed one of the parties was abusing the discovery process, and, if he had to rule on the twenty plus interrogatories at issue, he was going to sanction the offending party. These warnings were off the record, but were later placed on the record as best as each party could remember at a later hearing. Based on the warnings and direction of the Judge, the lawyers left the courtroom and attempted to settle the dispute concerning the discovery matters. Respondent urged Petitioner Schulze to reconsider his objections (as Respondent considered them to be frivolous) but Petitioner chose to maintain his objections.

Upon returning to the court, Judge Downey considered Respondent's Sanctions Motion. The court heard arguments of both counsel and ruled on the objections of Braden. Almost all of Braden's objections were overruled, and in fact, the only objections which were sustained to the interrogatories

were those which exceeded thirty questions according to the court's counting of the responses. The court concluded that both parties were "abusing the discovery process" and sanctioned both parties. A sanction of $10,000.00, payable to Respondent was imposed upon Braden. E. M. Schulze, Braden's attorney, and Petitioner herein, was ordered to perform ten hours of community service work at the Harris County Child Protective Services. (Tr. at 34-36 S.F. At 31-2)[1] It is only these community service sanctions that are before this Court.

Braden filed a Motion for Leave to File Petition for Writ of Mandamus in the Texas intermediate court of appeals, but leave was denied. The Texas Supreme Court granted leave to file the motion. The Supreme

---

[1] The trial court also sanctioned counsel for Respondent for combining its discovery requests into a single document, which apparently the court found to be offensive. Counsel for Appellee was also sanctioned by the imposition of five hours mandatory community service, which has been satisfactorily performed and is not before this Court.

Court ordered that the enforcement of the sanctions be stayed until such time as Braden had an opportunity to appeal.

Subsequent to the mandamus proceedings of the Texas Supreme Court, the trial court heard Respondent's Motion for Entry of Judgment on July 9, 1991. On July 25, 1991, the trial court signed the Final Judgment from which Braden and Petitioner Schulze appealed (Tr. at 34-36) to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas. The court of appeals overturned the monetary sanction against Braden, but upheld the imposition of the community service sanction against Schulze. The Texas Supreme Court refused to review the decision of the court of appeals and it was allowed to stand. Schulze then filed his Petition for Writ of Certiorari to this Court.

II. THE CIRCUMSTANCES OF THIS CASE

Petitioner argues that the trial court erred by imposing sanctions against him because the sanctions were not just or appropriate under the circumstances of this case. The Texas Supreme Court reviewed the "circumstances of this case" in the mandamus opinion, to which Respondent defers for the recitation of facts.

> South Main Bank (Respondent) loaned a limited partnership $620,000, secured by a lien on certain commercial real estate. The borrower's general partners and most or all of its limited partners, including Braden (Petitioner's client), each person personally guaranteed repayment of a portion of the loan. The part Braden guaranteed was $69,750. When the partnership became insolvent, Braden sued the Bank and others (including the bank, its president, the general partner, the accountant, appraiser, and lawyer involved in the transaction) in Montgomery County, where he resided, seeking to avoid the obligation of his guaranty and to recover actual and punitive damages on various liability theories. (Supreme Court footnote No. 2: Braden alleged causes of actions for negligence, statutory and common law fraud, violations of the Texas Deceptive Trade Practices-Consumer Protection Act and Texas

> Securities Act, breach of fiduciary duty and of the duty of good faith and fair dealing, and breach of contract.) The Bank foreclosed on its security and then sued the partnership and the guarantors in Harris County for the deficiency, alleged to be $485,767.57.

Braden v. Downey, 811 S.W.2d 922, 925 (Tex. 1991).

Respondent took the deposition of Braden. Braden was evasive and provided little or no information to assist Respondent in the defense of this matter. As the Texas Supreme Court stated:

> Braden could hardly be characterized as forthcoming in this answers to questions at his depositions, nor was his counsel's conduct there entirely professional. The deposition transcript reflects that during examination by the Bank's counsel, which lasted less than a day, Braden consulted with his attorney over sixty times. At one point, Braden's attorney objected to questions about Braden's contentions in the case, stating:
>
> Our contentions are set forth in the pleadings, and so far as I know, the only means of discovering our contentions are by Special Exceptions or by virtue of interrogatories. It's not a proper

question in a deposition.

Braden, 811 S.W.2d at 927.

The Texas Supreme Court went on to specifically discuss the discovery that was sought by Respondent, after the deposition and the responses of Braden.

> After the Bank took Braden's deposition, it directed a discovery request to Braden containing eight requests for admission of facts, five requests for production of documents, and a first set of twenty-five numbered interrogatories, one with two subparts and two with five subparts each. Braden responded by objecting to most of the interrogatories and denying most of the requests. More specifically, Braden denied: that the Bank was the owner and holder of the note signed by the partnership; that the partnership had defaulted on its note and contract obligations to the Bank; that the deficiency owed by the partnership was $485,767.57; that interest on the deficiency was accruing at the rate of 11% per annum; that Braden was liable to the Bank for the partnership's debts; and that a reasonable and necessary attorney fee to collect the debt owed by the partnership would be $48,516.76. Braden admitted only that he had signed a guaranty agreement. Each request for

admission was accompanied by an interrogatory asking Braden to "state all facts relied upon in denying the Request or objecting to it" if the request was not admitted. Braden answered the interrogatory relating to his denial that the Bank was the owner and holder of the partnership note by stating that he was not in a position to know one way or the other. To all the other interrogatories relating to denied requests for admission, Braden repeated the following objection:

> This interrogatory is objected to because it is vague, ambiguous, overly broad, non-specific, and unduly burdensome in requesting this party to "state all facts relied upon" in denying the claim. Under the Texas Rules of Civil Procedure the number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. An interrogatory requesting a party to "state all facts" in essence requests a party to state the entire substance of all testimony, documents, and other evidence which may be offered at trial. This would

> of necessity involve a narrative discourse encompassing more than thirty answers and would require the disclosure of work product.

In each instance, except for the interrogatory about attorney fees, Braden added:

> This interrogatory is also objected to because Don T. Braden has been extensively examined at deposition about these very same matters. To now inquire about these same matters in interrogatories is unduly burdensome.

Braden lodged essentially the same objections to interrogatories which asked him: to "State in detail" what banking and credit review services were to be provided the partnership; to "state all facts" supporting a conclusion that such services were not properly performed; to state the content and source of information supporting his claim that banking services rendered were deficient; and to state how he was damaged as a result. Braden also objected on the same basis to several interrogatories which requested him to state in detail the factual basis for certain of his claims, including what

misrepresentations were allegedly made by the Bank, who made them, and what was said. In response to an interrogatory which asked him to identify all persons with relevant or discoverable knowledge about the litigations, Braden stated:

> To the knowledge of this party, the only persons having knowledge of relevant matters are the parties to this lawsuit, the parties to Cause No. 89-04947, the persons mentioned in my deposition taken on September 20, 1988, and respective attorneys of the parties. The addresses and business affiliations of these persons are already known to you. To require this party to compile a list of addresses is unduly burdensome. If you should encounter difficulty in locating any of these persons, please contact my attorney and he will provide you with such information as I may have concerning the location of the person.

Braden, 811 S.W.2d at 925, 926.

After consideration of these facts, this Court will conclude, as did Judge Downey, the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, and the Texas Supreme Court that the sanctions were just. Petitioner would have this Court review the sanctions as if they were imposed in a vacuum, and ignore all of the events prior to the sanctions hearing. The trial court, however, had to address this matter as it was presented. For the facts and reasons recited by the Texas Supreme Court, it is clear that the sanctions imposed by the trial court were just and appropriate under the circumstances of this case.

PETITIONER'S QUESTION PRESENTED NO. 1

Whether a judgment in a civil case directing petitioner to "work" for a governmental agency violates the Thirteenth Amendment's prohibition against involuntary servitude?

PETITIONER'S POINT OF ERROR NO. 1

The Court of Appeals erred in holding that the work order was not prohibited by the Thirteenth Amendment.

RESPONSE TO PETITIONER'S QUESTION AND POINT OF ERROR NO. 1

Petitioner Schulze avers that the actions of the trial court in imposing upon him the sanction of community service, have in fact, placed him in the

position of an indentured servant.[2] Petitioner's argument is that to require him to do any "involuntary service" is to deprive him of his freedom and results in a disguised "confinement." The argument is without merit.

Tax evaders have made this same argument for years without success. These tax cases hold that where the "involuntary servitude" arises from one's own actions, the constitution offer no protection and is not designed to interfere. The consistent holding is that since the individual received the income (which included the taxes due), but chose not to pay it, any action taken by the Internal Revenue Service is nothing more than the predictable result of their own actions. In Beltran v. Cohen, 303 F.Supp. 889,

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[2] Thirteenth Amendment, Section 1. Slavery prohibited: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

(N.D.Calif. 1969) the court held that, "the hardship stems more from the conduct of the taxpayer than from the nature of the statute." Id at 893.

In Detwiler v. United States, 406 F.Supp. 695 (E.D.Penn. 1975) the court adopted the language from Beltran and refused to find the action unconstitutional when the hardship stemmed not from the action of the agency, but from the conduct of the taxpayer.

These tax cases offer the best analogy to the instant petition. It was not the arbitrary action of the trial court which has created the Petitioner's situation. Rather, it is his own actions that have brought about the sanction. As in the tax cases, when one's own conduct is the cause of the "involuntary servitude", the protection of the constitution is not available.

PETITIONER'S QUESTION PRESENTED NO. 2

Whether it was a denial of due process to order petitioner to "work" for a governmental agency under a rule of civil procedure authorizing "such orders...as are just"?

PETITIONER'S POINT OF ERROR NO. 2

The Court of Appeals erred inholding that the Texas Rule authorizing "such orders... as are just" is not unconstitutionally vague.

RESPONSE TO PETITIONER'S QUESTION AND POINT OF ERROR NO. 2

As set forth in the lower appellate court opinion, Braden v. South Main Bank, 837 S.W.2d 733, (Tex.App.--Houston [14th Dist.] 1992, writ ref'd n.r.e.) the ordered community service is an acceptable sanction that was within the authority of the trial court to impose. This authority comes from Rule 215 2(b) of the Texas Rules of Civil Procedure and from the

inherent authority of the trial court. Petitioner argues that the imposition of a work order under either standard violates his right to due process. His argument is that to allow the trial court to impose "such orders as are just" is to allow the court to impose sanctions or penalties under an impermissibly vague standard. Petitioner is not clear how the sanction would be unconstitutional if imposed under the court's inherent power, which is not limited by the language of Rule 215 T.R.C.P.

As the court of appeals pointed out, paragraph 2(b) of Rule 215 has been reviewed in many different contexts by both the intermediate appellate courts and the Texas Supreme Court. There has been, however, no cases even suggesting that paragraph 2(b) is vague. Absent a case addressing vagueness, the 14th Court of Appeals reviewed the decisions for any case which might have found the language "such orders...as are just" ambiguous. The Court stated, "we can find

no hint that any Texas court considers "such orders...as are just" ambiguous. Braden, 837 S.W.2d at 740.

The Court went on to add that the standard has long been accepted as sufficient for reviewing the imposition of discovery sanctions and that the standard is no more vague than other legal concepts such as "abuse of discretion."

The court stated that even if it could be argued that the words "such orders....as are just" are vague in and of themselves, the Texas Supreme Court has cured any potential problems with the tests set out in Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991)

As set forth at greater length infra at 27, the Texas Supreme Court set forth in great detail the standards which would set the bounds of permissible sanctions under Rule 215 T.R.C.P. In conclusion, the appellate court in this matter noted that, "with such

guiding principles propounded by the Texas Supreme Court, it is impossible to say that paragraph 2(b) is unconstitutionally vague. Braden, 837 S.W.2d at 741.

Petitioner cites the Court to Grayned v. City of Rockford, 408 U.S. 104 (1972), in support of his contention. This case, and the many cited within, are clearly distinguishable from the case at bar. These cases deal with vaguely worded criminal ordinances. Each case deals with the infringement of behavior clearly protected by the First Amendment. The individuals involved were arrested and criminally prosecuted for conduct that the arresting officers determined to be violative of the ordinances in question. The defendants in Grayned, unlike Petitioner, were not given thirty-two days written notice, a hearing and a verbal warning by a judge prior to becoming subject to the allegedly offensive sanction. Finally, the language complained of by the Petitioner in the present case deals with the range of

punishment available to the trial court, not the conduct which is prohibited by the ordinace, as in Grayned, and the cases cited therein. For the above reasons, the Court's rationale in Grayned is just not applicable.

Respondent argues that the order of the court was well within its authority under both Rule 215 of the Texas Rules of Civil Procedure and the inherent authority of the court.

A. INHERENT AUTHORITY OF THE COURT

In addition to the authority granted to the trial courts by the Texas Rules of Civil Procedure, all Texas courts have inherent powers to regulate, manage and discipline the attorneys appearing before them.

This authority, which empowers a court in the State of Texas to impose sanctions upon attorneys, arises from its inherent power to manage and control the affairs of its proceedings. See Roadway Express, Inc. v. Piper, 447 US 752, 100 S.Ct. 2455, 2464 (1980). In short, the power of a court over the members of its

bar is at least as great as its authority over the litigants which appear before it. Cf. Unauthorized Practice Committee, State Bar of Texas v. Cortez, 692 S.W.2d 47, 51 (Tex. 1985). A unique symbiotic relationship exists between the courts and the attorneys in the legal professional. Id. This relationship stems from the fact that an attorney has a duty to the court as an officer of the court, Ex parte Norton, 191 S.W.2d, 713, 716 (Tex. 1946), and the court has the duty and authority to supervise the legal profession. Cortez, 692 S.W.2d at 51.

A recent United States Supreme Court decision has once again addressed the inherent authority of trial courts. In Chambers v. Nasco, Inc., _____U.S. _____, 111 S.Ct. 2123 (1991), this Court held that the promulgation of rules concerning sanctions did not limit the inherent authority of the court to sanction. Chambers, 111 S.Ct. at 135. The court went on to state that the court has the inherent authority to

impose sanctions, particularly when the sanctionable conduct arises outside of the sanctions provisions. The court added, however, that a federal court is not forbidden to sanction conduct by means of its inherent powers simply because that conduct is also subject to sanctions under the statute or the rules. Chambers, 111 S.Ct. at 2135, 36. The Chambers Court went on at great length to set forth the inherent power of the trial court, and its relationship to statutory or regulatory sanctions.

> We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses.
>
> Chambers, 111 S.Ct. at 2134.

In Texas the courts' inherent power over

attorneys emanates from Tex. Const. art. 5 § 1, which provides:

> The judicial power of this state shall be vested in one Supreme Court and Courts of Appeals, and a Court of Criminal Appeals, and District Courts and County Courts, and Commissioner's Courts, and Courts of justices of the peace and in such other courts as may be provided by law.

The "judicial power" allows a court to enter such orders as are needed to regulate and discipline the parties and lawyers appearing before it.

In this case, an analogy to Respondent's order can be drawn to the power of a court to disbar an attorney practicing before it. See Scott v. State, 86 Tex. 321, 24 S.W. 789 (1894); State v. Pounds, 525 S.W.2d 547, 551 (Tex.Civ.App.--Amarillo 1975, writ ref'd n.r.e.). Prior to the adoption of the State Bar Act, Tex. Rev. Civ. Stat. Ann. Art 320a-1 (Vernon 1973) which has been recodified at Tex. Gov't. Code Ann. § 81 (Vernon 1988), each court had the unmitigated

power to disbar attorneys practicing before it. With the adoption of the State Bar Act, this specific power was regulated and displaced to a certain extent. However, the inherent powers of the court to regulate and control the attorneys appearing before it remains. Daves v. State Bar of Texas, 691 S.W.2d 784, 789 (Tex.App.--Amarillo 1985, writ ref'd n.r.e) cert. denied, 106 S.Ct. 774 (1986); cf. Cortez, 692 S.W.2d at 51. Thus, if a district judge can disbar an attorney, he surely can impose the lesser sanction of community or public service.

Federal courts have this inherent power to levy sanctions against members of the Bar which practice before it. There is no reason why the courts of the State of Texas, based upon the Texas Constitution, should not have the same powers. Similar reasoning was found in Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977, 983 (1937). The Supreme Court of Missouri held that as a part of its inherent power it had the authority

to discipline or disbar attorneys for misconduct. Similarly, Judge Downey had the authority to impose community service as a sanction under his remaining inherent powers. Such a sanction is not an abuse of discretion because it is within the Court's power and deters future non-compliance with pre-trial discovery.

B. AUTHORITY UNDER RULE 215 T.R.C.P.

The second source of the Court's authority comes from the Texas Rules of Civil Procedure 215(2)(b) which stated in pertinent part in 1989 that, "the court in which the action is pending may, make such orders in regard to the failure as are just and among others the following:..." Rule 215 then provides a laundry list of available or suggested sanctions. The simple language of the rule, however, indicates that these are merely among the sanctions available to the court. The only limitation provided on the court by the terms of Rule 215 is that the orders must be just.

The Texas Supreme Court has interpreted that

rule in order to expand upon what elements are to be considered in determining if a sanction is just. In Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991) the Texas Supreme Court stated that determination as to whether a sanction is just is measured by two standards. First, there must be a direct relationship between the offensive conduct and the sanction imposed. Id at 917. The court went on to state that the direct relationship requires that a just sanction be directed against the abuse and toward remedying the prejudice caused the innocent party. Id at 917. Second, the sanction may not be excessive. In the words of the Texas Supreme Court, "the punishment should fit the crime." Id. The court went on to state that, "a sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes." Id.

Those legitimate purposes are (1) to secure the party's compliance with the rules of discovery; (2) to

deter other litigants from the violating the discovery rules; and (3) to punish parties who violate the rules of discovery. Downer v. Aquamarine Operations, Inc., 701 S.W.2d 238 (Tex. 1985); Jarrett v. Warhola, 695 S.W.2d 8 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd); Carr V. Harris County, 745 S.W.2d 531 (Tex. App.--Houston [1st Dist.] 1988, no writ).

Respondent asserts that the trial court was clearly within its authority to sanction the Petitioner as it did, regardless of whether that authority arises from the inherent authority of the Court or from the specific granting of authority by the Texas Rules of Civil Procedure. This Court's decision in Chambers, supports this assertion.

Furthermore, when there is a bad-faith conduct in the course of litigation that could be adequately sanctioned under the rules, the Court ordinarily should rely on the rules rather than the inherent power. But if in the informed discretion of the court, neither the

statute nor the rules are up to the task, the court may safely rely on its inherent power. Chambers Id at 2134.

PETITIONER'S QUESTION PRESENTED NO. 3

Whether it was a denial of due process to order petitioner punished without his being notified in advance that he was subject to punishment and without affording him an opportunity to be heard?

PETITIONER'S POINT OF ERROR NO. 3

The Court of Appeals erred in holding that petitioner received adequate advance notice.

RESPONSE TO PETITIONER'S QUESTION AND POINT OF ERROR NO. 3

Petitioner argues that he was not given timely advance notice that the court would review his conduct for abuse of discovery. This is patently false. The pleading before the court clearly indicated even in its title that sanctions were being sought.

The concept which Petitioner wishes this Court

adopt is that litigants are under no duty to comply with

choose until such time as they are informed that the actions will be reviewed. As set forth below, Petitioner had more than adequate notice that the Sanctions Motion was filed seeking relief under Rule 215 of the Texas Rules of Civil Procedure. Most significantly, however, is the underlying proposition that no party is under any duty to comply with discovery in good faith until such time as sanctions are demanded. This is directly contrary to the lawyer's creed which the Petitioner claimed mandated his behavior, and every other authority and principle governing the practice of law in Texas.

Petitioner argues that an oral warning from the bank at the time of the hearing "to work it out" or sanctions would be imposed was insufficient as a matter of law to meet the procedural due process safeguards afforded all litigants. Petitioner is

completely ignoring the document upon which the hearing was held and the notice given prior to that hearing. That document, entitled "Plaintiff, South Main Bank's Motion to Compel Answers to Interrogatories, Production of Documents, and for Sanctions" (emphasis added) clearly put the Petitioner on notice that sanctions were being sought. Additionally, by way of its prayer, Respondent again made it clear that it was seeking sanctions pursuant to Texas Rules of Civil Procedure. That prayer requested relief pursuant to Rule 215 "Abuse of Discovery; Sanctions" and specifically Rule 215 §2(b) and Rule 215 §2(d). Additionally, Respondent made a prayer for other relief to which it may show itself justly entitled.

In Woodruff v. Cook, 721 S.W.2d 865 (Tex.App.--Dallas 1986, no writ) the court in addressing a similar situation, held that a motion's substance is not to be determined by its caption but from the body and prayer for relief. Woodruff, 721 S.W.2d at 870.

Further, the Woodruff court felt that a simple review of the plaintiff's motion and its prayer were sufficient to put the defendant on notice of the actual purpose of the hearing. *In the present case, a simple review of* the Motion, and particularly the prayer for relief, were sufficient to put Petitioner on notice that sanctions were being sought.

Respondent recognizes the duty arising out of Rule 215 to notify all parties, and that an application for sanctions or to comply discovery may only be made "upon reasonable notice to other parties and all other persons affected thereby." Rule 215(1). This burden has been met.

The Texas courts have been diligent in providing that any sanctioned attorney or litigant is provided full procedural due process. Imposing monetary sanctions against a litigant or depriving a party its opportunity to pursue or defend their case without an opportunity to be heard would violate the

basic requirements of due process. Worldwide Anesthesia Associates, Inc. v. Bryan Anesthesia, Inc., 765 S.W.2d 445, 448 (Tex.App.--Houston [14th Dist.] 1988, no writ). A number of other courts have addressed the issue of due process and held that as long as a hearing is held before the sanctions were imposed, then the due process requirement had been met. Palmer v. Cantrell, 747 S.W.2d 39 (Tex.App.--Houston [1st Dist.] 1988, no writ).

The Sanctions Motion clearly gave reasonable notice to the Petitioner that sanctions were sought, and was sent by certified mail to the Petitioners on November 16, 1989. This matter was set for a hearing and did not come before the court until December 18, 1989, some thirty-two (32) days later. Petitioner has raised no issue as to adequate notice of the Motion or of the hearing held thereon.

Thus it is clear that the Respondent met all necessary requirements in Rule 215, as well as the

standards promulgated by the Texas in enforcing the procedural due process rights of litigants.

CONCLUSION

E. M. Schulze has petitioned this Court to review the decision of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, which upheld the trial court's imposition of sanctions for conduct found to be abusive of the discovery process. Pursuant to Rule 10 of the Rules of the Supreme Court, a petition for Writ of Certiorari will be granted only when there are special and important reasons therefore. Petitioner has not met this burden. There is no important federal question, heretofore unanswered, which requires resolution by this Court. Nor has there been any holding that conflicts with the decisions of the Supreme Court.

For the reasons set forth at length above, Respondent urges this Court to find that:

1. The petition of E. M. Schulze has not raised a question of important federal law, which requires the correction of this Court; and

2. There is no lower decision in conflict with the opinions of the Supreme Court; and

3. The imposition of community service as a sanction is not prohibited by the Thirteenth Amendment; and

4. The authority of Texas court to sanction offensive conduct with "such orders ... as are just" is not unconstitutionally vague; and

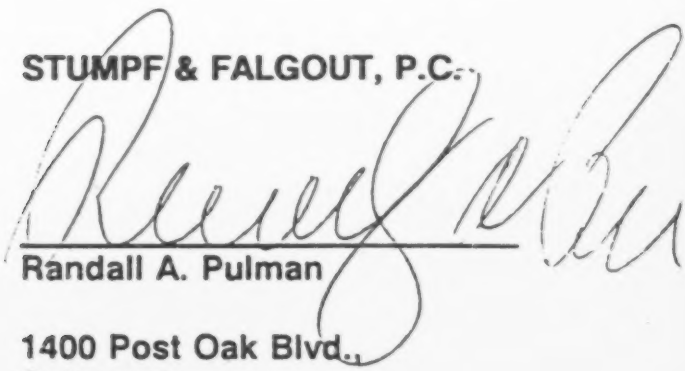
5. That the Petitioner was afforded adequate notice.

PRAYER

Respondent, South Main Bank, respectfully prays that this honorable Court deny E. M. Schulze's Petitioner for Writ of Certiorari, and be granted any and all such other relief, at law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

STUMPF & FALGOUT, P.C.



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